Supreme Court, U.S.
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No. 01-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

THOMAS DOUGLAS ARTHUR,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

THOMAS DOUGLAS ARTHUR'S REPLY TO BRIEF IN OPPOSITION

Theresa Trzaskoma
Heiner Braun
Suhana S. Han
Katherine Richardson
125 Broad Street
New York, New York 10004
(212) 558-4000

Russell Neufeld
Counsel of Record
Arnold J. Levine
E. Niki Warin
c/o The Legal Aid Society
49 Thomas Street
New York, New York 10013
(212) 732-5000

Counsel for Petitioner
Thomas Douglas Arthur

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The State of Alabama has wrongfully deprived Thomas Arthur of any meaningful opportunity for collateral review of his conviction or death sentence. Despite its unconstitutional conduct, Alabama still seeks to execute Mr. Arthur and make him the first capital defendant involuntarily put to death without *any* postconviction review. Mr. Arthur's case presents significant questions concerning due process, fundamental fairness, and right to counsel. With these most basic constitutional principles at stake, the State is wrong in arguing that this case does not merit review as it merely involves the "interpretation of Alabama procedural rules" in "a very narrow field of law." (Opp. at 15, 20, 24) *See, e.g., Cooper* v. *Oklahoma*, 517 U.S. 348 (1996); *Beck* v. *Alabama*, 447 U.S. 625 (1980); *Green* v. *Georgia*, 442 U.S. 95 (1979) (all involving the constitutionality of state procedural rules in capital cases).

I.

Alabama's Rule 32 Scheme Denied Mr. Arthur a Meaningful Opportunity to Raise His Federal Claims.

In opposing Mr. Arthur's petition with respect to his due process claim, Alabama advances several arguments.

First, Alabama contends that Mr. Arthur failed to raise his due process claim below. This assertion is unfounded. In his Motion to File An Out of Time Petition for Relief From Judgment, Mr. Arthur invoked the "Fourteenth Amendment[] to the United States Constitution," and specifically argued that the failure to provide notice that the statute of limitations had begun to run "deni[ed] the accused due process of the law." (A22, A24) In his Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals, Mr. Arthur again raised the issue of whether the enforcement of the statute of limitations violated due process. (Reply A8-A9) Thus, Mr. Arthur's federal due process claim was adequately presented below. *See New York ex rel. Bryant* v.

Zimmerman, 278 U.S. 63, 67 (1928); *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155, 159 n.5 (1980).

Second, Alabama argues that the Court of Criminal Appeals' decision was based on state law and is therefore beyond this Court's power of review.[1] Contrary to the State's contention, however, the state-law ground for the decision below — that the statute of limitations barred Mr. Arthur's claims — is neither independent nor adequate.

It is well settled that the question of independence and adequacy of a state ground "is not within a state's prerogative finally to decide;" rather, this question "is itself a federal question." *Lee* v. *Kemna*, 122 S. Ct. 877, 885 (2002) (internal quotation marks and citation omitted). Where a state court refuses to review a federal claim on the basis of a procedural rule that does not comport with the requirements of due process, as is the case here, this Court has jurisdiction to review such a decision. Indeed, "state procedure can never be independent of the requirements of due process." 16B Charles Alan Wright et al., *Federal Practice & Procedure* § 4025 (2d ed. 1996).

Moreover, although a state may erect reasonable procedural requirements for seeking postconviction relief, including a limitations period, a procedural rule that frustrates the exercise of a federal right is inadequate to bar federal review. *See Staub* v. *City of Baxley*, 355 U.S. 313, 325 (1958); *Davis* v. *Wechsler*, 263 U.S. 22, 24-25 (1923). The test

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[1] Alabama recycles several arguments in opposing each of Mr. Arthur's claims: (1) that the state court's decision was based on state law, (2) that there is no factual record, and (3) that the issues are not worthy of review. For the reasons discussed in this section, none of those arguments is persuasive as to any of Mr. Arthur's claims.

for determining whether a procedural rule "raises an insuperable barrier to one making claim to federal rights" is whether a "defendant has had a reasonable opportunity to have the issues as to the claimed right heard and determined by the state court." *Michel* v. *Louisiana*, 350 U.S. 91, 93 (1955). Even if a rule does not raise such an "insuperable barrier" on its face, "in the circumstances of a particular case the application of such a rule may not give a reasonable opportunity." *Id.* at 95.

Alabama's rigid application of the statute of limitations in this case is fundamentally unfair because it deprives Mr. Arthur of a reasonable opportunity to litigate a number of federal claims, some of which could not have been raised earlier. Here, the lack of notice and the combination of other deprivations, *see infra* at 5-6, created an "insuperable barrier" to the exercise of federal rights. Accordingly, Alabama's procedural rule is an inadequate state ground that cannot preclude federal review.

Third, Alabama disputes Mr. Arthur's claim that he was deprived of notice by asserting that there is no factual record to support this allegation. Although Mr. Arthur requested a hearing in the trial court (A17), the State objected to this request and moved to dismiss his Rule 32 petition as untimely filed. Having successfully blocked Mr. Arthur from presenting evidence to the courts below, the State now seeks to use the absence of a hearing as a shield to this Court's review of its unconstitutional conduct. The lack of a detailed factual record should not preclude review on this issue, however, because the relevant facts are not in dispute.

Significantly, Alabama does not (and cannot) dispute that the certificate of judgment was never sent directly to Mr. Arthur. Instead, Alabama relies on the trial court's speculation that Mr. Arthur's "direct appeal counsel would have had notice that the certificate of judgment had been

issued" on April 7, 1998. (Opp. at 14 n.9) But Mr. Arthur was not represented by counsel at the time the certificate issued, and Mr. Arthur never received a copy of the certificate.[2] Alabama also does not dispute that the state failed to provide Mr. Arthur with counsel or legal assistance, that Mr. Arthur attempted but was unable to obtain counsel on his own, or that Warden Jones refused to permit investigators to visit Mr. Arthur.

Fourth, Alabama contends that the due process issue, like Mr. Arthur's other claims, is not worthy of this Court's review. Each of the questions presented in Mr. Arthur's petition, however, involves significant constitutional principles that extend beyond the specific facts of this case. These principles, relating to the accuracy and reliability of guilt and punishment determinations in capital cases, are of heightened concern now, in light of recent events that demonstrate how frequently the death penalty is erroneously imposed. *See, e.g.,* Jodi Wilgoren, *Panel in Illinois Seeks to Reform Death Sentence*, N.Y. Times, Apr. 15, 2002, at A1; Kris Axtman, *U.S. Milestone: 100th Death Row Inmate Exonerated*, The Christian Science Monitor, Apr. 12, 2002, at 1; Jackie Hallifax, *Florida Death Row Inmate Released, 99th Freed Nationwide*, The Associated Press, Jan. 4, 2002; Henry Weinstein, *DNA Tests Give Idahoan Freedom After 17 Years on Death Row*, Los Angeles Times, Aug. 24, 2001, at A23; Jonathan Alter, *The Death Penalty on Trial*, Newsweek,

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[2] On direct appeal to the Alabama Supreme Court, Mr. Arthur was represented by John Rall, who withdrew from the case shortly before oral argument. The Alabama Supreme Court asked LaJuana Davis to appear on Mr. Arthur's behalf for the limited purpose of arguing before that court. Ms. Davis's representation of Mr. Arthur ended on March 20, 1998, when the Alabama Supreme Court denied Mr. Arthur's Application for Rehearing.

June 12, 2000, at 24; *A Death Row Mistake: DNA Clears Inmate 11 Months After Cancer Death*, Newsday, Dec. 15, 2000, at A22.

Finally, Alabama challenges the merits of Mr. Arthur's due process claim. But Alabama misstates the requirements of due process in arguing "[a]ll that is required is that the petitioner be given an *opportunity* to pursue the claim." (Opp. at 16) (original emphasis) This Court has made clear that mere opportunity is insufficient to satisfy due process; instead, "[w]hat the Fourteenth Amendment require[s] is an opportunity granted at a *meaningful* time and in a *meaningful* manner for a hearing appropriate to the nature of the case." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (internal quotation marks and citations omitted) (emphasis added).

Alabama maintains that the two-year limitations period for filing a petition was a reasonable hurdle to postconviction review because it provided Mr. Arthur with "ample time to file his petition while not foreclosing any opportunities to present claims of innocence." (Opp. at 17) But such time was of little value to Mr. Arthur, who had been denied access to *any* resource — appointed counsel, legal assistance, investigators, and adequate law library facilities — that would have enabled him to file a timely Rule 32 petition.[3] In light of all these deprivations, Mr.

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[3] Alabama argues that counsel would have been appointed if Mr. Arthur had filed a petition by "simply fill[ing] in the blanks" of a Rule 32 form. (Opp. at 17 n.12) But Alabama's postconviction scheme does not guarantee the appointment of counsel for everyone who files a petition. Even assuming such a form had been available to Mr. Arthur (an unsupportable assumption given the condition of the law library), he still would have been required to include a "full disclosure of the factual basis" of his claims in

Arthur was denied a meaningful opportunity to pursue his federal claims, in violation of the Due Process Clause. The untimeliness of his Rule 32 petition should therefore be excused.

II.

Mr. Arthur's Sixth Amendment Claim Has Not Yet Been Addressed and Resolved by the Court.

In attempting to refute the merits of Mr. Arthur's right to counsel or legal assistance claim, Alabama erroneously argues that the issue presented in this case — whether the right to counsel extends to postconviction proceedings when they are the first opportunity to raise certain constitutional claims — has already been decided by this Court. As Mr. Arthur explained in his petition, it has not. (Pet. at 21-22, 26 n.15)

To support its position, Alabama relies on a decision by the Fourth Circuit, *Mackall* v. *Angelone*, 131 F.3d 442 (4th Cir. 1997). But that case is different in a critical way: unlike Mr. Arthur, who never had counsel or legal assistance during the limitations period, the petitioner in *Mackall* was represented by counsel in his first state habeas corpus proceeding. Alabama's reliance on that case is therefore misplaced.

Alabama also errs in arguing that the conflict between *Jackson* v. *Mississippi*, 732 So. 2d 187 (Miss. 1999) and *Gibson* v. *Turpin*, 513 S.E.2d 186 (Ga. 1999) is rooted in state statute only. There can be no question that both of these state supreme court opinions are based on federal constitutional

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order to withstand summary dismissal. *See* Ala. R. Crim. P. 32.6(b). Mr. Arthur could not obtain the relevant facts, however, because the State refused to permit an investigator to visit him.

law. In *Jackson*, the Mississippi Supreme Court specifically relied on the "[a]ccess to equal justice principle" announced by this Court in *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996), when it determined that a capital defendant has a right to counsel in postconviction proceedings. Further, the *Jackson* court found *Giarratano* — a federal constitutional case — inapplicable in light of the differences between the death row schemes, in particular that unlike Virginia death row inmates, those in Mississippi have been "unable to obtain counsel or requisite help from institutional lawyers." 732 So. 2d at 191. Likewise, the Georgia Supreme Court in *Gibson* interpreted federal law and held that there is no "federal constitutional right to an appointed lawyer upon habeas corpus." 513 S.E.2d at 187. Indeed, that court distinguished Mississippi as the only state that has "recognized a *constitutional* right to appointed counsel." *Id.* at 191-92 (original emphasis). Thus, Mr. Arthur's petition presents a claim that warrants certiorari review to resolve a conflict between these jurisdictions.

III.

By Emphasizing Irrelevant Trial Transcripts, Alabama Has Attempted to Evade the Merits of Mr. Arthur's Eighth Amendment Claim.

In opposing the petition with respect to Mr. Arthur's claim under the Eighth Amendment, the State primarily relies on the lack of a factual record regarding the specific circumstances of Mr. Arthur's case. But the facts relevant to Mr. Arthur's Eighth Amendment claim are not in dispute: Alabama does not provide its capital defendants with either counsel or legal assistance or even minimal legal resources to help them file a postconviction petition. Alabama is therefore out of step with almost every other death-penalty state in the country, and unconstitutionally deviates from an evolving national consensus on standards of decency in capital cases.

Because Alabama cannot dispute that its scheme differs from the schemes of other death-penalty states, and because it cannot deny that Mr. Arthur was without counsel or legal assistance during the period of limitations, it attempts to obscure the issue by citing to statements Mr. Arthur made during closing arguments at his trial. These statements have no relevance to Mr. Arthur's petition and do not constitute "admissions" by him. They reveal nothing about the condition of Holman Prison's death row law library during the time that Mr. Arthur had for filing his postconviction petition.

Further, even if Mr. Arthur's statements were to be counted as admissions here, they do not prove that Alabama provided its death row inmates with adequate law library facilities at any time, much less during the relevant time period. Although Mr. Arthur may have argued to the jury that he would have greater access to resources on death row than in general population, his comments were based on the assumption that any information he could collect would be passed on to his *attorney* representing him on direct appeal. However, Mr. Arthur, who had never participated in postconviction proceedings before, could not know what minimum resources he would need to file a postconviction petition on his own and whether he would be able to access those resources from death row.

Notwithstanding the relatively positive picture of death row that Mr. Arthur painted to the jury, the reality of Mr. Arthur's circumstances has been grim. During the two years he had to file a Rule 32 petition, Mr. Arthur was not given access to lawyers or investigators, and indeed, the State affirmatively prevented him from accessing these resources. Accordingly, the State's conduct constitutes a violation of the Eighth Amendment.

Conclusion

For the reasons stated above and in the Petition, the Court should grant a writ of certiorari and reverse the decision of the Alabama Court of Criminal Appeals.

Respectfully submitted,

Theresa Trzaskoma
Heiner Braun
Suhana S. Han
Katherine Richardson
125 Broad Street
New York, New York 10004
(212) 558-4000

Russell Neufeld
Counsel of Record
Arnold J. Levine
E. Niki Warin
c/o The Legal Aid Society
49 Thomas Street
New York, New York 10013
(212) 298-5116

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